STATE OF MICHIGAN

COURT OF APPEALS

ANTOINE KANDALAFT,

Plaintiff-Appellant/Cross-Appellee,

v

JOHN M. PETERS, P.L.C.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
April 17, 2007

No. 267471
Wayne Circuit Court
LC No. 04-426462-NM

JOHN M. PETERS, P.L.C.,

Plaintiff-Appellee/Cross-Appellant,

v

ANTOINE KANDALAFT,

Defendant-Appellant/Cross-Appellee,

and

RANDA KANDALAFT and GAN GONY, INC.,

Defendants.

No. 267497
Wayne Circuit Court
LC No. 04-032197-GC

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff, Antoine Kandalaft, appeals the lower court's grant of summary disposition in favor of defendant, John M. Peters, P.L.C. (hereinafter "Peters"), on Kandalaft's claim of legal malpractice. On cross-appeal, Peters challenges the trial court's denial of his request for the imposition of sanctions against Kandalaft for filing a frivolous complaint. We affirm.

Kandalaft's legal malpractice claims arise from a prior lawsuit involving a property dispute between Kandalaft and Cvetko Zdravkovski (hereinafter "Zdravkovski") pertaining to an alleged encroachment of Kandalaft's business structure onto a lot owned by Zdravkovski. In the underlying action, Kandalaft had retained several different attorneys, including Peters, for his legal representation. In the lower court, Peters filed a motion for summary disposition, on behalf of Kandalaft, asserting three alternative legal theories: (a) reformation and clerical error in chain of title, (b) adverse possession, and (c) acquiescence. The trial court granted summary disposition in favor of Kandalaft and Zdravkovski appealed to this Court. On April 13, 2004, this Court reversed the trial court's order granting summary disposition in favor of Kandalaft and denying Zdravkovski's motion for summary disposition on his claim of encroachment, and remanded the matter to the trial court "for a determination of the proper remedy for the encroachment." *Zdravkovski v Gan Gony, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 13, 2004 (Docket No. 246392).[1]

In his legal malpractice action, Kandalaft asserted Peters failed to submit important documentary evidence to both the trial court and the Court of Appeals in the underlying property litigation. In addition, Kandalaft contended Peters failed to present or elucidate before the Court of Appeals the same arguments, which proved successful in the lower court. In response, Peters averred that all appropriate and necessary documents were submitted to both the trial court and the Court of Appeals and that Kandalaft is merely mistaken and fails to comprehend that the Court of Appeals received all documentary evidence and pleadings contained within the lower court record for its review. Peters further asserted that all arguments presented in the lower court were included within the appellee brief submitted on Kandalaft's behalf, as well as addressed in oral argument before this Court. We review the grant or denial of summary disposition de novo. *The Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000).

Four elements must be proved by a plaintiff to establish a legal malpractice claim: (a) the existence of an attorney-client relationship; (b) the acts, which were alleged to have constituted the negligence; (c) that the negligence was the proximate cause of the injury; and (d) the fact and extent of the injury alleged. *Persinger v Holt*, 248 Mich App 499, 502; 639 NW2d 594 (2001). A plaintiff in a legal malpractice action asserting negligence in an appeal, must prove two aspects of causation in fact: "whether the attorney's negligence caused the loss or unfavorable result of the appeal, and whether the loss or unfavorable result of the appeal in turn caused a loss or unfavorable result in the underlying litigation." *Charles Reinhart Co v Winiemko*, 444 Mich 579, 588; 513 NW2d 773 (1994). The question of whether an underlying appeal would have been successful is reserved to the court "because whether an appeal would have been successful intrinsically involves issues of law within the exclusive province of the judiciary." *Id.* at 608.

Contrary to Kandalaft's assertion, there existed no document, argument or "magic bullet" that could have altered the outcome of this Court's ruling. This Court determined that the trial

[1] Peters appealed this Court's ruling reversing the grant of summary disposition in favor of Kandalaft to the Michigan Supreme Court, which denied the application. *Zdravkovski v Gan Gony Inc*, 471 Mich 885; 688 NW2d 507 (2004).

court decision in favor of Kandalaft regarding adverse possession and acquiescence was in error because Kandalaft's claims did not meet the requisite statutory periods. In addition, this Court found that "[t]he fact that plaintiffs gave defendants and their predecessors in interest permission to use the property directly refutes the theory that the parties treated the line running along the edge of defendants' building as the true boundary line," thus, precluding a finding of acquiescence. *Zdravkovski, supra*, slip op at 3. This Court also found that Kandalaft failed to demonstrate acquiescence or the need for reformation of the relevant deed due to the lack of ambiguity or inconsistency of the legal descriptions contained within the various deeds. This Court noted that reformation would not be available simply because Zdravkovski and Kandalaft were not parties to the same contract. *Zdravkovski, supra*, slip op at 3. Finally, this Court determined that the evidence supported a determination that Zdravkovski was the rightful owner of the disputed parcel and that Kandalaft's unapproved building on the property resulted in an encroachment. Hence, it is logical to infer that Kandalaft's alleged underlying injury, regarding this Court's reversal of the trial court's grant of summary disposition in his favor, was not based on Peters negligence or malpractice, but rather on the legal insufficiency of Kandalaft's asserted claims.

Although Kandalaft's brief on appeal is contradictory[2] and verges on incomprehensible in the presentation of his arguments, it would appear to this Court that the gist of his assertion of malpractice by Peters in the lower court encroachment action is the failure of the attorney to present and argue, in detail, certain documentary evidence, including the affidavit of appraiser Karen M. Hardin, alleged discrepancies in the DiMaggio deed from prior surveys of the property, and Zdravkovski's own purported testimony acknowledging ownership of the 3.5 feet of Lot 1103, situated west of Zdravkovski's bakery building. Notably, documents or arguments regarding these issues were contained within the pleadings submitted on behalf of Kandalaft by Peters in the lower court. Kandalaft's assertion that Peters failed to sufficiently argue or assert the content of these documents or pleadings in the lower court is disingenuous, given Peters success in obtaining a favorable ruling on behalf of his client in that venue. Further, in granting summary disposition on behalf of Kandalaft, the trial court specifically indicated that it was adopting Peters "arguments contained in the written briefs and oral argument." Hence, the grant of summary disposition in favor of Peters on Kandalaft's legal malpractice claim pertaining to Peters' allegedly deficient performance in the trial court is clearly not erroneous given the positive outcome attained by Peters on behalf of his client in that court.

Kandalaft next asserts Peters committed malpractice in this Court when the lower court's ruling regarding the encroachment was reversed on appeal. Kandalaft complains Peters failed to sufficiently set forth and argue the two primary arguments, which were successful in the lower court, concerning the absence of an encroachment and equitable reformation. Kandalaft assumes that, based on counsel's initial success in the trial court, any variation in argument or reliance by Peters on alternative theories of recovery, such as acquiescence and adverse possession, at the

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[2] Kandalaft simultaneously argues that certain documents, such as the affidavit of the appraiser, Karen M. Hardin, were not provided to the trial court or the Court of Appeals, but then acknowledges their inclusion as exhibits in the lower court record.

appellate level constituted malpractice. Contrary to Kandalaft's assertions, all of the issues and legal theories were contained in the appellate brief submitted on his behalf by Peters and were ultimately addressed by this Court in its ruling. Kandalaft fails to comprehend that these arguments, as set forth both in the lower court record and the brief on appeal, were all before the Court for consideration and review. MCR 7.210(A)(1). In addition, an appellate attorney's decision pertaining to which issues to raise is a matter of judgment and generally does not comprise grounds for claiming malpractice if the attorney acts in good faith and exercises reasonable care. *Simko v Blake,* 448 Mich 648, 658; 532 NW2d 842 (1995). An appellate attorney is not required to raise every claim of arguable legal merit in order to be an effective counsel. *People v Reed,* 449 Mich 375, 382; 535 NW2d 496 (1995).

In addition, Kandalaft takes issue with Peters' decision not to request reconsideration by this Court but, rather, to pursue an appeal to the Michigan Supreme Court. However, given the definitive and unanimous ruling by this Court, Peters' decision to not seek reconsideration falls squarely within the attorney judgment rule. The "attorney judgment rule" recognizes that decisions made involving trial tactics or litigation strategy may avoid the issue of legal liability. An attorney is responsible for fashioning a strategy or representation that is consistent with the law, but does not have to insure the most favorable possible outcome. An attorney may make "mere errors in judgment" if the attorney has acted in good faith and has demonstrated reasonable skill, care, discretion and judgment equivalent to that of the average practitioner, in performing the legal representation. *Simko, supra* at 655-658. Given this Court's ruling regarding the viability of Kandalaft's claims, Peters acted in good faith and demonstrated reasonable skill, care, and discretion in electing to pursue remedies in the Supreme Court rather than expending time and resources on what would have been a fruitless endeavor.

Kandalaft also contests the dismissal of his legal malpractice action based on the failure to present expert testimony that malpractice was committed and the interplay of the attorney judgment rule. This is consistent with prior rulings by this Court that, in claims of professional malpractice, a plaintiff's assertion that a professional breached the applicable standard of care must generally be supported by expert testimony. *Law Offices of Lawrence J Stockler, PC v Rose,* 174 Mich App 14, 48; 436 NW2d 70 (1989). Cases requiring expert testimony involve matters of special knowledge strictly involving professional skill that would not ordinarily be known or in the province of a layperson. *Id.* This is a consideration separate and distinct from a determination regarding the viability of plaintiff's appeal. As such, the trial court did not err when it concluded that expert testimony would be required to establish a prima facie case of legal malpractice under the factual circumstances presented.

Finally, Kandalaft submits, in conjunction with this appeal, various telephone transcripts allegedly conducted between Kandalaft and Peters, asserting Peters' agreement to restrict the arguments and legal theories presented in the encroachment action to denial of an encroachment and deed reformation. Notably, these transcripts are not authenticated and do not appear in the lower court record. Hence, this Court will not address or consider these documents, as they are an improper attempt by Kandalaft to expand the lower court record. MCR 7.210(A)(1).

In his cross-appeal, Peters contends the trial court erred in denying his request for sanctions pursuant to MCR 2.114(D). We review a trial court's determination whether to impose sanctions under MCR 2.114 for clear error. *Kitchen v Kitchen,* 465 Mich 654, 661-662; 641 NW2d 245 (2002). A decision is clearly erroneous where, although there is evidence to support

it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

MCR 2.114(D) provides that the signature of a party on a pleading constitutes a certification by the party that:

> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

MCR 2.114(E) further provides that if the document is signed in violation of the rule, the court, on the motion of a party or its own initiative, shall impose upon the person who signed it an appropriate sanction. It is clear from the language of the rule that sanctions may be imposed upon unrepresented parties. *People v Herrera,* 204 Mich App 333, 338; 514 NW2d 543 (1994).

While case law suggests that the pleadings of pro se litigants are held to "less stringent standards" than those drafted by attorneys, *Haines v Kerner,* 404 US 519, 520; 92 S Ct 594; 30 L Ed 2d 652 (1972), the technical leniency permitted does not suggest that pro se litigants are not required to follow the court rules or that their claims should survive despite an absence of factual support. It is irrelevant that Kandalaft could not prevail against Peters for the purpose of awarding sanctions for a frivolous claim. Claims do not become frivolous simply because they do not prevail. However, it is relevant that the arguments, as they were at the time of filing, do not appear to have been interposed or raised by Kandalaft for a wrongful purpose or harassment. In this instance, the trial court's apparent determination that Kandalaft's claims, although misguided and mistaken, were not imposed for an improper purpose and, thus, were not subject to sanction, does not comprise clear error.

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Bill Schuette